

SRC APPROVED

Date July 9, 2009  
SLM

## State Records Committee Meeting

Division of Archives, Courtyard Meeting Room

June 11, 2009

Salt Lake City, Utah

Members Present: Scott Daniels, Citizen Representative  
Lex Hemphill, Media Representative  
Gary Ott, Elected Official Representative  
Betsy Ross, State Auditor's Designee  
Patricia Smith-Mansfield, Governor's Designee  
Scott Whittaker, Private Sector Records Manager, Chair

Member Excused: Chris Hansen, History Designee

Legal Counsel: Paul Tonks, Attorney General's Office  
Ed Lombard, Attorney General's Office

Executive Secretary: Susan Mumford, Utah State Archives

Attending by telephone: Corey Vonberg, petitioner

Others attending: Kevin Anderson, petitioner  
Rosemary Cundiff, Archives  
Philip D. Dracht  
Letisha Garrick, Department of Public Safety  
Mike Gorrell, Salt Lake Tribune  
Alan Hennebold, Utah Labor Commission  
Kim Hood, Administrative Services  
Maren Jeppsen, Archives  
Tiffany O'Sheal, Archives  
Lana Taylor, Attorney, Department of Public Safety  
Rich Townsend, Department of Public Safety

### **Mr. Scott Whittaker called the meeting to order at 9:38 a.m.**

He waited to start the meeting until a quorum of the Committee was present. He explained the procedures to the parties.

## **Hearing – Corey Vonberg vs. Department of Public Safety**

### **Opening statement – petitioner**

Mr. Corey Vonberg at the Utah State Prison was contacted by phone. He introduced himself. He said that he had asked for records including criminal records, civil records and AKAs for Paul Bottema of Cedar City.

### **Opening statement – respondent**

Lana Taylor, attorney for the Department of Public Safety, and Rich Townsend, deputy commissioner of the Department of Public Safety, introduced themselves. Ms. Taylor said a letter denying access to records concerning Mr. Bottema was sent to Mr. Vonberg after his request. After a second request, the department thoroughly searched its records and found that there were none pertaining to Mr. Bottema. The department notified Mr. Vonberg of that fact. Subsequently, he appealed to the State Records Committee. The department had no records concerning Paul Bottema, neither criminal nor civil. The Bureau of Criminal Investigation keeps records of criminal history, or rap sheets, but since Mr. Vonberg is not entitled to a search of that database for another person's records, the Department of Public Safety did not search there.

### **Petitioner – testimony**

Mr. Vonberg said he understood that arrest warrants, initial contact reports, and jail booking records were public pursuant to UCA 63G-2-301(g) and 63G-2-103(13)(a). He said it was the duty of the law enforcement department in Cedar City to investigate any report that would reflect on Mr. Paul Bottema's status as a police officer. Mr. Vonberg said his counsel, Mr. Keith Barnes, had not presented any evidence against the law enforcement officers who arrested him at his trial. That was the reason he wanted access to the records. He said that the charges against him had been manufactured. He wanted to prove there had been criminal charges against Paul Bottema, a police officer, who had been involved in the case against him.

### **Testimony – respondent**

Ms. Taylor said that Mr. Vonberg's initial request had been forwarded from Cedar City and that Mr. Vonberg had also requested records from Police Officer Standards and Training (P.O.S.T.). He had also been referred to the Iron County Sheriff's Office for his records request. The Office of Public Safety had no records that pertained to Mr. Bottema. The only records that were not searched were those of the Bureau of Criminal Investigations (B.C.I.) because Mr. Vonberg was not entitled to those records. Individuals are entitled to access their own criminal history. For a record of an individual's arrests, there could be criminal reports kept by federal authorities or by individual police departments. Mr. Rich Townsend was sworn in as a witness. He said he was with the Bureau of Criminal Investigation for 12 years. Utah is a closed records state and has never released the criminal history of an individual as a public record. Criminal history records are governed by Utah Code Annotated (UCA) UCA 53-10-108 and UCA 63G-2-201(3)(b). Access to the records is controlled by statutory guidelines. The identity of an individual requesting their own criminal history is checked against fingerprints before a record is released to that individual. In certain states, one can go online and get individual criminal histories. Until the legislature changes the approach, Utah

is a closed records state. He said he had served as director of P.O.S.T. for a period of time. P.O.S.T. deals with individual officer indiscretions and does not investigate an officer because of an accusation such as Mr. Vonberg has made.

**Closing statement – petitioner**

Mr. Vonberg said the Department of Public Safety claimed they have never had any records on Mr. Bottema, yet they have not checked BCI records which are under their jurisdiction. On the one hand they say there are no records, and on the other hand they say they have not checked. If you go to the courts, there is public information available about all the trials. There they are public records. The reason he had not requested records of the Iron County Sheriff was that he felt they were aiding and abetting the law enforcement officers who had manufactured charges against him. He recounted his arrest in Iron County and said that it would not be logical that the Department of Public Safety would not have some records on the officers involved. He said it was important for the public to be able to have trust in law enforcement officers; therefore, criminal information about them should be public.

**Closing statement – respondent**

Ms. Taylor reiterated the department's stand that it had no records relating to Paul Bottema. She said that the BCI database had not been searched for records; therefore, she did not know if any existed. Access to criminal background checks is regulated by UCA 53-10-108 and UCA 63G-2-201 (3)(b). They are not public records. It was also the department's position that they are not required to create a record they do not already maintain. The department did not maintain any of the records requested in Mr. Vonberg's original GRAMA request.

**Deliberation**

Ms. Smith-Mansfield made a motion that the Department of Public Safety had classified the requested records correctly under UCA 53-10-108 and 63G-2-201(3)(b). Criminal histories kept by BCI do not qualify as public records and are therefore not subject to Mr. Vonberg's request. She added that it appeared that the Department of Public Safety had made a search of records other than those kept by BCI and had not found records pertaining to Paul Bottema. Ms. Ross seconded the motion. A vote was taken. Mr. Ott abstained from voting because he was not present for the full hearing. Mr. Hemphill, Ms. Ross, Ms. Smith-Mansfield, Mr. Whittaker, and Mr. Daniels voted in favor of the motion. The motion passed. The parties were thanked for their attendance and told that an order would be issued within five business days.

**Second Hearing – Kevin Anderson vs. Utah Labor Commission and Commissioner Hayashi**

Mr. Kevin Anderson introduced himself. Mr. Tonks asked if he represented anyone else for the hearing. Mr. Anderson said he was the petitioner appearing in his own behalf. Mr. Philip Dracht introduced himself as an attorney for the petitioner. Mr. Alan Hennebold introduced himself. He represented the respondent, the Utah Labor Commission.

**Opening statement – petitioner**

Mr. Anderson said that in January of 2009, he had requested records from Commissioner Sherrie Hayashi of the Utah Labor Commission (ULC) pertaining to the Crandall Canyon mine accident. He had asked for transcripts of interviews and meetings conducted by the

Department of Labor's Mine Safety and Health Administration (MSHA). He had asked for minutes of interviews and meetings conducted by MSHA; drafts of reports of interviews conducted by MSHA; all correspondence from August 1, 2007, through the present relating to the accident; and all other documents, notes, correspondence, emails, charts, models, graphics, analyses, and findings, relating to the Crandall Canyon mine accident. Mr. Anderson said that Alan Hennebold, deputy commissioner and general counsel for the Utah Labor Commission (ULC) had responded that there were no records responsive to the first four of his six requests. Emails between Commissioner Hayashi and Richard Gates and James Crawford were provided to Mr. Anderson as the only records in the possession of ULC responsive to his request. Mr. Hennebold had responded that ULC and Commissioner Hayashi had in their possession approximately 100 pages of handwritten notes made by Commissioner Hayashi and 100 pages of other evidence obtained by Commissioner Hayashi during the investigation. Commissioner Hayashi claimed that the documents were "protected" pursuant to UCA 63G-2-305(9). Mr. Anderson said that the records held by ULC were not part of any continuing investigation and should no longer be classified as "protected." Investigation of the mine accident had been completed. It appeared that Commissioner Hayashi had not been a significant participant in the investigation. Mr. Anderson said he was aware of at least 80 interviews that had been conducted as part of the investigation. He gave the Committee members parts of the report made by the MSHA investigating group. The report quoted directly from three interviews. Since the report was completed, the interview transcripts should be made available as public information. Commissioner Hayashi's notes were made as part of her role on the investigating team. She could have requested that the interviews and transcripts be made available to her.

#### **Opening statement and testimony – respondent**

Mr. Hennebold said that Commissioner Hayashi had been allowed to sit in on the proceedings of the MSHA investigation. He said that under the Utah Safety Act, MSHA had regulatory authority for the investigation. The Utah Labor Commission qualified as a "governmental entity" required to maintain records. Pursuant to UCA 63G-2-305(9)(a), the records in question were "created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes." The records were "protected" if release of the records (a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing certification, or registration purposes." He felt the word "reasonably" could be aptly applied to the protection of the records. Such protection did not necessarily need to "preclude" or "prevent" an investigation, just reasonably to interfere with an investigation. It was on that basis that the Labor Commission had classified the records as "protected."

#### **Closing statement – petitioner**

Mr. Anderson said that the federal government's investigation into the mine accident was completed. Commissioner Hayashi was not involved in a criminal investigation, and her personal notes did not qualify for protection because of any ongoing investigation. Commissioner Hayashi did not have possession at any time of the interview transcripts. It appears that her participation in the government investigation was minimal. In the MSHA report several of the interview transcripts were quoted. The other documents requested represented her participation in the proceedings. Governor Huntsman said that the information

would be shared with the public. Mr. Anderson said the state had no continuing role in a criminal investigation; therefore there was no reason to protect the documents. The U.S. attorney's criminal investigation or a broader investigation that may be ongoing had not concerned the companies that Mr. Anderson said he represented. The MSHA investigation had been concluded, and a report published. Governmental entity, as described in UCA 63G-2-103 under definitions did not include the federal government. An ongoing investigation by the federal government or by MSHA would not be a proper basis to withhold a record that the state maintains. Ms. Hayashi's role in the investigation was completed. There would be no reason why information from her participation in the investigation could not be made public.

#### **Closing statement – respondent**

Mr. Hennebold said he appreciated the effort the Committee made to interpret GRAMA. He said that the first four items of the initial request were no longer at issue. Commissioner Hayashi's had been asked by the governor to participate in the MSHA investigation. At the time of the accident in Crandall Canyon, Utah had no inspection or enforcement authority in place for coal mine safety. Commissioner Hayashi had no independent regulatory authority to involve herself in the investigation. A direct outgrowth of her participation was that the Utah State Legislature enacted the Coal Mine Safety Act. The Labor Commission itself is a governmental entity with obligations to manage records and disclose them in accordance with GRAMA. Referring to UCA 63G-2-305(9), a definition of a "governmental entity" is not significant to an understanding of the statutory provision. The records under discussion were "created and maintained for civil, criminal, or administrative enforcement purposes." They may be protected if "release of the records reasonably could be expected to interfere with the investigations undertaken for enforcement...." The statement does not require a guarantee of interference. Brent Tolman, the US attorney, stated there was reasonable concern for possible interference in investigations if the records were to be released.

#### **Deliberation**

##### **Closed Session**

Mr. Hemphill made a motion that the Committee review the records *in camera*. Mr. Daniels seconded the motion. Mr. Hemphill, Mr. Ott, Ms. Ross, Ms. Smith-Mansfield, Mr. Whittaker, and Mr. Daniels voted in favor of the motion. The Committee went into closed session to review the records. The closed session lasted from 11:40 a.m. until 11:55 a.m.

##### **Open Session**

Ms. Smith-Mansfield made a motion that the Committee return to open session for deliberation. Mr. Hemphill seconded the motion. Mr. Hemphill, Mr. Ott, Ms. Ross, Ms. Smith-Mansfield, Mr. Whittaker, and Mr. Daniels voted in favor of the motion. The Committee returned to open session to deliberate. Mr. Hemphill made a motion that pursuant to UCA 63G-2-305(9)(d), the governmental entity had properly classified the records as "protected." Mr. Daniels seconded the motion. A vote was taken. Mr. Hemphill, Ms. Ross, Ms. Smith-Mansfield, and Mr. Daniels voted in favor of the motion. Mr. Whittaker voted against the motion. The motion passed. Mr. Whittaker thanked the parties for their participation and said that an order would be issued within five business days.

#### **Approval of minutes**

Ms. Ross made a motion that the minutes of the May 14, 2009, meeting of the State Records Committee be approved. Mr. Daniels seconded the motion. A vote was taken. Mr. Daniels, Mr. Hansen, Mr. Hemphill, Mr. Ott, and Ms. Ross voted for the motion. Ms. Smith-Mansfield abstained from voting. The minutes were approved.

#### **Appeals received**

Ms. Mumford reported that three hearings would be scheduled for July 9, 2009. Committee members requested that the meeting begin at 9:00 a.m. in July. One hearing originally scheduled for July had been postponed until August at the request of the petitioner.

#### **Cases in District Court**

Mr. Tonks reported on cases in District Court. See attached list of cases and actions. No decision had been made in the Southern Utah Wilderness Alliance vs. Automated Geographic Reference Center case. Mr. Tonks argued the case in behalf of the State Records Committee. Judge Medley did not rule at the time and said that a written opinion would be made within 45 days of the hearing.

#### **Draft of Rule changes**

Ms. Mumford submitted the substantive changes to the Division of Administrative Rules voted on by the Committee. The rules will be published for public comment in the June 15, 2009, Administrative Rules Bulletin. Public comments will be accepted until July 15, 2009. The rules could become effective on July 22, 2009.

#### **Other business**

Ms. Smith-Mansfield said that a bill concerning the weighing provision failed at the last minute in the 2009 session of the Utah State Legislature and is not under consideration as an interim study. The proposed bill did not support the original legislative intent of the GRAMA law which is: all interests being equal, public interest is favored.

#### **Adjournment**

Mr. Whittaker thanked the Committee for their attendance and the meeting was adjourned by acclamation.

**Next meeting scheduled for July 9, 2009, at 9:00 a.m.**

## **June 2009 Records Committee Case Updates**

### **District Court Cases**

**Investigative Research v. UDOT**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 080925956, Judge Tyrone Medley. Filed December 17, 2008.

**Current Disposition:** Motions for summary judgment filed by Investigative Research (March 11, 2009) and UDOT (April 23, 2009). Request to submit for decision and request for oral argument filed by UDOT on June 8, 2009.

**Garside v. Salt Lake City**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 080923342, Judge Tyrone Medley. Filed November 5, 2008.

**Current Disposition:** Appeal filed by Jim Garside. Court granted Salt Lake City's motion for summary judgment and a judgment entry was prepared by Salt Lake City. Garside filed a motion to reconsider Court's decision and objected to Salt Lake City's proposed judgment entry. In a minute entry decision dated March 31, 2009, the Court overruled Garside's motion and adopted the proposed order dismissing case with prejudice. On April 24, 2009, the Court issued an order denying Garside's motion for reconsideration. No appeal has been filed.

**Douglas Carter v. Utah Dept. Of Corrections**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 080916813, Judge Denise Lindberg. Filed August 14, 2008.

**Current Disposition:** Telephone settlement conference held on March 9, 2009. Rejected request by Carter to strike our decision. Corrections and Carter are still discussing possibility of settlement. Post-Conviction petition for Carter was recently dismissed by trial court.

**Murray City v. Maese**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 080912185, Judge Christiansen. Filed July 11, 2008.

**Current Disposition:** Maese's counterclaim was dismissed by trial court and order entered on December 18, 2008 adopting Murray City's proposed entry. Appeal filed with the Utah Court of Appeals by Maese. Appeal dismissed by Court of Appeals and case returned to trial court. Court currently considering motions to strike and compel discovery.

**Utah Dept. of Corrections v. Clanton**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 080909757, Judge Lindberg. Filed June 13, 2008.

**Current Disposition:** Answer filed in case. Clanton seeking discovery in case (request for production of documents). Department of Corrections filed motions opposing requests for discovery. No other activity since September 15, 2008. Show Cause hearing held on May 27, 2009. Parties agreed to file motions for summary judgment (Dept. of Corrections & Clanton).

**West Daniels Land Association v. Wasatch Cty.**, 4<sup>th</sup> Judicial District, Wasatch County, Case No. 080500196. Filed April 28, 2008.

**Current Disposition:** Petition filed for judicial review of April 16, 2008 decision denying request for surveillance video tapes taken at the office of the Wasatch County Clerk from Nov. 8-12, 2007. Show Cause hearing held on March 6, 2009 was actually a Show Cause hearing for other case between West Daniels Land & Wasatch County (mistaken entry by Court Exchange). Waiting to see how Court will rule on other case to see how GRAMA appeal case will proceed.

**Tolton v. Town of Alta**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 030914055, Judge Hilder. Filed June 23, 2003.

**Current Disposition:** Notice of consent to release index of documents filed with the Court on March 4, 2009. Should have an order from the Court shortly allowing Tolton to file an appeal of trial court decision.

### **Utah Supreme Court Cases**

**Southern Utah Wilderness Alliance v. Automated Geographic Reference Center**, Utah Supreme Court, Case No. 20060813-CA. District Court Case No. 050909118.

**Current Disposition:** Decision from Utah Supreme Court on December 23, 2008 overturning Trial Court's decision to uphold Records Committee decision to deny SUWA's record request. Court found that records were not protected by attorney client privilege. Case remanded to district court. SUWA filed a motion to have order from court ordering records to be produced and have "Defendants" pay attorney fees and costs pursuant to Utah Code Ann. §63G-2-802(2). Filed memorandum opposing motion for attorney fees on February 10, 2009. Participated in oral arguments before Judge Medley on April 29, 2009. Judge Medley stated that he was going to take the motion under consideration and issue a written opinion within 45 days. Still awaiting decision.